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Policing, Professionalism and Liability for Negligence

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Abstract

Should the police be subject to a duty of care in relation to their investigative and crime-suppressing functions? The current position, as recently reaffirmed in *Michael v South Wales Police* (2015) is that they should not. There is however a lack of cohesion in the courts' reasoning on this point in the line of cases since *Hill v Chief Constable of West Yorkshire Police* first addressed the issue. Further in *Michael*, a separate claim, relying on human rights law, has been allowed to proceed and a similar claim against the police for failings in the context of a rape investigation has recently come before the Supreme Court in *D v Chief Commissioner of the Metropolitan Police* (judgment pending). This article considers whether the concept of professionalism can cast new light on the doctrinal and policy dilemmas the courts encounter in determining the scope of police liability in such circumstances. It explores ideas of professionalism, drawing on the sociological literature and looks at how these ideas take legal shape and form in the field of professional negligence, focusing in particular on the ways professionalism has informed the scope and content of the duty of care. Thereafter, the article explores the instrumental benefits that professional status affords the police, reflecting on these in the context of relevant case law and considering the extent to which they bear upon the question of whether and when the police should owe members of the public a duty of care. It concludes by suggesting that the recently observable shift towards viewing policing as a profession adds further weight to arguments in favour of recognising a duty of care in relation to core police functions at least in some instances

1 Introduction

It is a tremendous honour to participate in this symposium celebrating the work of our colleague, Keith Stanton. Over the last 40 years, Keith has been at the vanguard of tort scholarship, critically charting the doctrinal ebbs and flows as judges strive – and often struggle – to render the law of tort coherent and just, principled and practical, stable and responsive to the challenges posed by social, economic and technological change. As co-author of a leading textbook and co-founder of the

leading journal,¹ Keith's name has become virtually synonymous with the field of professional negligence. It is perhaps no surprise then to discover that Keith approaches his area of specialism with the fond ambivalence of a parent who sees a child developing in ways which are both unforeseen and not entirely welcome. Keith came to negligence just as Lord Atkins' famous neighbour principle² was reaching the zenith of its influence, offering the promise of unity to a tort traditionally conceived as fragmented and diffuse. His concern was – and still is – to promote a judicial approach to the resolution of negligence claims which meets the demands of individual justice while fostering the construction of a doctrinal framework which is coherent and navigable. These considerations have featured frequently in Keith's scholarship, in particular in his cautious assessment of the long slow decline of the neighbour principle post-*Anns*³ and the corresponding emergence of a potpourri of judicial techniques to manage and contain the expansionist tendencies which *Donoghue v Stevenson* appeared to unleash. In a series of articles⁴ Keith has highlighted the variety of approaches the courts have taken to the question of whether and when a duty of care should arise, contrasting the unifying impetus of the neighbour principle with the now more prevalent judicial tendency to cultivate distinct 'pockets' of negligence liability in different contexts.⁵ At the root of pockets thinking, Keith argues, are policy considerations which inform the judicial approach to the imposition of liability in discrete contexts.⁶ Policy here colludes with incrementalism, the judicial inclination to 'develop novel categories of negligence incrementally and by analogy with existing categories'.⁷ The end result is an increasingly splintered doctrinal framework in which a disposition *not* to extend the scope and range of duty situations is formally incorporated into judicial deliberations.

This is the point where Keith's concerns resonate with our own interest in whether and/or when the police owe a duty of care to individuals in the course of carrying out their investigative and crime-suppressing functions. A focal point of contestation since first considered in *Hill v Chief Constable of*

¹ Keith was among six co-founders of the *Journal of Professional Negligence* in 1984. The first edition of A Dugdale and K Stanton, *Professional Negligence* appeared in 1982. It has since gone to three editions.

² 'You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour' *Donoghue v Stevenson* [1932] AC 562 at 580.

³ *Anns v Merton London BC* [1978] AC 728.

⁴ K Stanton 'Incremental approaches to the duty of care' in Mullany, N (ed) *Torts in the Nineties* (1997); 'Professional negligence: duty of care methodology in the twenty-first century' (2006) 22 PN 134; 'Decision-making in the tort of negligence in the House of Lords' (2007) 15 Tort L Rev 93; 'Use of scholarship by House of Lords in tort cases' in Lee J (ed) *From House of Lords to Supreme Court* (2011); 'The neighbour principle in the twenty-first century: yesterday's revolution' (2012) 20 Tort L Rev 61.

⁵ See especially (2012) 20 Tort L Rev 61.

⁶ *Ibid* at 70-71.

⁷ *Sutherland Shire Council v Heyman* (1985) 157 CLR at 481 per Brennan J (High Court of Australia) and later endorsed by the House of Lords in *Caparo Industries v Dickman* [1990] 2 AC 398 and *Murphy v Brentwood District Council* [1991] 1 AC 398.

West Yorkshire Police,⁸ the dominant judicial tendency has been to push back against attempts to recognise the possibility of negligence liability where individuals are adversely affected by police failures to protect them from third party criminal acts or to investigate those acts with due care.⁹ Nevertheless, the issue has continued to find its way to the courts, culminating most recently in *Michael v Chief Constable of South Wales Police*,¹⁰ a decision which might be thought to put to rest speculation on a question which has preoccupied the courts now for some decades. Upholding a striking out application, the Supreme Court decided that neither South Wales nor Gwent Police owed a duty of care to Joanna Michael, whose brutal murder by her ex-partner might have been avoided had the police responded promptly to her desperate 999 call. Speaking for the majority, Lord Toulson held that no duty arose from a 'pure omission'¹¹ and that with respect to the application of this common law principle the police were subject to the same rules as private citizens.¹² Because the police failure to protect the complainant from a third party criminal act fell within the category of omission, no liability ensued except where responsibility for the complainant's safety was assumed by the police and reliance placed by the complainant upon that assumption (circumstances which, according to his Lordship and not uncontroversially, were not present in *Michael*).¹³

Lord Toulson briefly considered the public policy arguments repeatedly invoked by judges to support a protective stance in relation to police liability.¹⁴ These arguments, first articulated by Lord Keith in *Hill*,¹⁵ encompass a range of concerns including: that liability would not encourage the police to observe a higher standard of care (as they were in need of no such motivation); that liability might however lead them to carry out their duties 'in a detrimentally defensive frame of mind'¹⁶; that the courts would be drawn into inappropriate deliberations about operational matters best determined by the police themselves; and finally that the time, trouble and expense to which the police would be put in mounting a defence to liability claims would result in a 'significant diversion of police manpower and attention from their most important function, that of the suppression of crime'.¹⁷

⁸ [1989] 1 AC 53.

⁹ *Osman v Ferguson* [1993] 4 All ER 344 (CA); *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495; *Van Colle v Chief Constable of Hertfordshire Police*; *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225.

¹⁰ [2015] UKSC 2, [2015] AC 1732.

¹¹ *Ibid* at para 97.

¹² *Ibid* at para 101. See also para 116: 'the question is not therefore whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles'.

¹³ *Ibid* at paras 99-100 & 138.

¹⁴ *Ibid* at paras 121-122.

¹⁵ *Supra* n 8 at 63.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

In the later case of *Brooks v Commissioner of Police for the Metropolis*,¹⁸ Lord Steyn expressed some reservations about the breadth of the assertions in *Hill*, particularly Lord Keith's confident pronouncement that the police could be trusted always to apply 'their best endeavours' to the performance of their functions.¹⁹ 'Nowadays', Lord Steyn acknowledged, 'a more sceptical approach to the carrying out of all public functions is necessary'.²⁰ However, his Lordship went on to reiterate with approval the core policy concerns:

A retreat from the principle in *Hill*'s case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim, time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill*'s case, be bound to lead to an unduly defensive approach in combating crime.²¹

In *Smith v Chief Constable of Sussex Police*,²² most of their Lordships were happy uncritically to endorse the policy position adopted in *Brooks*, denying a duty of care in circumstances where the police failure to protect the complainant, in the face of repeated threats ultimately resulting in serious physical harm, was particularly egregious.²³ By contrast, Lord Toulson in *Michael*, recognising no doubt the force of repeated criticisms of the policy assumptions underpinning *Hill*, was insistent that principle, not policy, should ultimately determine the outcome of the case.²⁴

It is fair to say that *Michael* has provoked mixed reactions. Some people welcome the return to principle²⁵ while others lament what they view as an unnecessarily restrictive stance on the question of whether and when the police should owe a duty of care in relation to their investigative and crime-suppressing functions.²⁶ The fact that two members of the Supreme Court, Lord Kerr and Lady Hale, dissented from the majority decision does not breed confidence that the matter has been

¹⁸ [2005] UKHL 24, [2005] 1 WLR 1495.

¹⁹ *Hill*, *supra* n 8 at 63 per Lord Keith cited by Lord Steyn in *Brooks*, *supra* n 18 at para 28.

²⁰ *Ibid* at para 28.

²¹ *Ibid* at para 30.

²² [2008] UKHL 50, [2009] 1 AC 225.

²³ Though see Lord Bingham's dissenting judgment, *ibid* at paras 49-52 (considered further below).

²⁴ *Michael* (*supra* n 10 at paras 115-116).

²⁵ N McBride, 'Michael and the future of tort law' (2016) 32 PN 14.

²⁶ S Tofaris and S Steel 'Negligence liability for omissions and the police' [2016] CLJ 128.

determinately settled. Moreover, the shift from policy to principle in the majority judgment leaves open for future determination the extent to which past decisions on the boundaries of police liability – which placed considerably more weight upon policy arguments - align with the application of this new principled approach. At the very least it could be argued that in some of the cases where a duty of care has been previously denied, the conduct of the police would struggle to fit the category of ‘pure omission’.²⁷ Equally vague, post-*Michael*, is the nature or extent of the ‘responsibility’ the police or the private citizen may be said to have assumed in a particular instance.²⁸ Keith Stanton is among a number of scholars who have argued that ‘assumption of responsibility’ is not a particularly effective technique for determining when a duty of care is owed. It will be a rare case, he argues, where an explicit assumption of responsibility for the interests of another will give rise to legal contention, so that in most cases the court is being asked to address the question of whether responsibility has been implicitly assumed or should be deemed to be assumed from the circumstances.²⁹ Far from putting the question of duty to rest, *Michael* arguably leaves a good deal still to be resolved.³⁰

In the light of this continued uncertainty, we seek to consider the decision in *Michael*, along with the case law upon which it purports to rest, from a fresh angle, one which troubles Lord Toulson’s intuitively suspect alignment of the police with private citizens when it comes to protecting individuals from crime. As Lord Kerr observes: ‘The police have been empowered to protect the public from harm’.³¹ Unlike private citizens, protecting the public from criminals is the role police officers are charged to perform; they are *professionals* when it comes to fighting crime. What, if any, significance should we attach to this, particularly in the context of tort law, where professional status has commonly informed the nature and scope of the duty of care owed? This article considers whether the concept of professionalism can cast new light on the doctrinal and policy dilemmas the courts encounter in determining the scope of police liability in negligence. It begins by exploring

²⁷ In both *Osman* and *Smith* (*supra* n 9), it could be argued that given the ongoing relationship between the police and the claimant, the police did not so much fail to act as act carelessly; equally it could be argued that the police had assumed a responsibility. In *Brooks* (*supra* n 18) the claim is of a different nature - not a failure to protect but a failure to treat the claimant with the care and respect to which he was entitled as a witness to a serious crime. Here it is only with considerable linguistic contortion that one can construe police failings as a ‘pure omission’.

²⁸ Lord Toulson devotes surprisingly limited attention to this issue (*Michael supra* n 10 at paras 100 and 138).

²⁹ Stanton (2006) 22 PN 134 at 138-139.

³⁰ A further wrinkle of uncertainty arises from the possibility of bringing a claim against the police under the Human Rights Act 1998, which the Supreme Court in *Michael* allowed to proceed. See also *D v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646, [2016] QB 161, which is currently before the Supreme Court. As McBride observes, ‘two bodies of law saying different things in the same jurisdiction on the same issue cannot long survive together; one invariably swallows up the other’ (*supra* n 25 at 26). The likely repeal of the HRA may well force confrontation/resolution of this issue sooner rather than later.

³¹ *Michael*, *supra* n 10 at para 181.

ideas of professionalism, drawing in particular on sociological literature. It then looks at how these ideas take legal shape and form in the field of professional negligence, focusing in particular on the ways professionalism has informed the scope and content of the duty of care. Thereafter, the article probes understandings of the police as professionals, including in the relevant case law, and considers the extent to which such understandings bear upon the question of whether and when the police should owe members of the public a common law duty of care. We conclude by suggesting that the recently observable shift towards viewing policing as a profession adds further weight to arguments in favour of recognising a duty of care in relation to core police functions at least in some instances. .

2 The nature of professionalism

There is a vast sociological literature on the subject of professions which is not generally explored by legal academics and only rarely brought to bear upon questions of professional liability.³²

Nevertheless, for both legal and social science scholars, a clear definition of the term ‘professional’ has remained elusive. As a designation which is more ‘honorific than technical’,³³ the notion of professionalism is both socially constructed and temporally and spatially bound. Consequently, not only do the definitional parameters of professionalism remain contested but the perceived significance and merits of professional status vary over place and time.³⁴

This instability of the concept notwithstanding, it is possible to sketch an outline of some commonly recurring components of professional status. The professional has high social standing and the professional domain is regarded as one of public service in that it relates to ‘our most important social functions’.³⁵ Professional practice generally requires extensive tertiary study and technical vocational training.³⁶ Moreover, the nature of the work undertaken is of such complexity that high levels of discretion and discernment are required to perform it successfully.³⁷ A corollary is that quality of performance is best judged by those who are similarly qualified.³⁸ This in turn permits the profession to seek a state-sanctioned mandate to self-regulate through its professional

³² A recent exception here is R Jackson ‘The professions: power, privilege and legal liability’ (2015) 31 PN 122, 125-129, which offers a useful overview of the sociological literature to the lawyer.

³³ A Abbott ‘The future of professions: Occupation and expertise in the age of organization’ (1991) 8 *Research in the Sociology of Organizations* 17, 18.

³⁴ Jackson, n 32 above. See also D Mangan ‘The curiosity of professional status’ (2014) 30 PN 74.

³⁵ T Parsons, *Essays in Sociological Theory* (1954) at 48.

³⁶ Mangan *supra* n 34 at 75.

³⁷ T H Marshall ‘The recent history of professionalism in relation to social structure and social policy’ (1939) 5 *Canadian Journal of Economics and Political Science/Revue Canadienne d'Economique et de Science Politique* 325, 328.

³⁸ M Davies, ‘The demise of professional self-regulation? Evidence from the “ideal type” professions of medicine and law’ (2010) 26 PN 3, 4.

associations.³⁹ The resulting monopolistic place in the market is nonetheless rendered benign by the expectation that professionals will operate in accordance with certain moral principles encompassing both concern for the interests of clients and those of the broader community.⁴⁰

These components of professionalism are each vested with a large degree of indeterminacy. Moreover, they are generally interdependent and mutually reinforcing. For example, the elevated social position associated with professional status stems, in part, from the level of education and expertise required and the perception of professionals' altruistic motivations towards their work. However, as Marshall notes 'professions are respected because they do not strive for money, but they can only remain respectable if they succeed, in spite of their pecuniary indifference in making quite a lot of money'.⁴¹ Additionally, because by its nature the proper performance of professional tasks requires clients to have a significant level of trust,⁴² high social standing is not only a consequence of, but also often a prerequisite to, successful performance of the role.

The weight and significance of each component changes with time and context. Law and medicine retain their status as archetypal professions.⁴³ However, where very large legal corporations compete for the custom of equally large commercial concerns, the mystique derived from the notion of professionalism as an individual service is much eroded, and the commitment of the profession to the greater interests of justice more difficult to sustain.⁴⁴ Similarly, the introduction of internal markets within the NHS and the potential to outsource work inevitably challenges traditional assumptions underpinning doctor-patient relationships.⁴⁵ Designations of domains of professionalism have also altered as roles and responsibilities have become more complex. In 1991, for example, policing was contrasted with law as lacking the 'esoteric and intellectual aspects of expert knowledge' required for professional status.⁴⁶ However, by 2003, following significant advancements in policing techniques consequent upon technological and business innovation, police claims to professional status were no longer dismissed out of hand.⁴⁷

Despite elements of indeterminacy and instability, the current sociological perspective on professions suggests that the commonly recurring components of professionalism identified above

³⁹ E Freidson, *Professionalism: The Third Logic* (2001) at 12, 17.

⁴⁰ Jackson, *supra* n 32 at 124-25.

⁴¹ Marshall, *supra* n 37 at 326.

⁴² *Ibid*; see also Mangan *supra* n 36.

⁴³ Davies, *supra* n 38 at 5.

⁴⁴ *Ibid* at 30-31.

⁴⁵ *Ibid* at 21.

⁴⁶ Abbott, *supra* n 33 at 27.

⁴⁷ J Evetts, 'The sociological analysis of professionalism: Occupational change in the modern world' (2003) 18 *International Sociology* 395, 399.

continue to have analytical purchase though the analytical stance adopted towards them has fluctuated. For the first part of the twentieth century, the scholarly perspective on professionalism was 'largely neutral'⁴⁸ seeking to distil an essence of professionalism from the distinguishing features of the archetypal professions.⁴⁹ A second, more critical, viewpoint emerged in the post-war period, which focused on the monopolistic market power conferred by state-sanctioned, closed ranks of licensed entry into the professional realm.⁵⁰ This shift in focus involved an analytical emphasis on the 'project of professionalisation', understood as the means by which the power of an occupational group to self-regulate was acquired and maintained.⁵¹ In contrast, more recent work has emphasised the changing organisational structures for the delivery of archetypal professional services⁵² and the 'casual generalisation' of contemporary usage of the term.⁵³ Scholars note that professionalism may now be understood more broadly to encompass 'workers providing services',⁵⁴ potentially including 'unlikely occupations' such as 'restaurant staff' and 'security personnel'.⁵⁵ Consequently, some scholars suggest that it is no longer valuable to attempt to define and delineate professions, but focus instead on what is inherent in claims to professionalism.⁵⁶

To this end, it has been argued that claims to professionalism can manifest at two levels. First, they can come from within the occupational group itself, in which case aspirations to professional status are inevitably informed by the mystique surrounding professional practice stemming from the classical understanding of professionalism set out above.⁵⁷ Macdonald refers to 'profession' as a 'lay or folk' term which draws on and/or is subject to contemporary public acknowledgement of professional status.⁵⁸ In other words, the creation of occupational associations which seek or obtain various degrees of regulatory autonomy will not be determinative of professional standing. Instead, a claim to professionalism is a claim to legitimacy on the basis of competence and has to be

⁴⁸ E Freidson, *Professionalism Reborn: Theory, Prophecy, and Policy* (1994) at 3.

⁴⁹ *Ibid* at 3-4.

⁵⁰ *Ibid* at 4.

⁵¹ See T Johnson, *Professions and Power* (1972) and M Larson, *The Rise of Professionalism* (1977).

⁵² Abbott *supra* n 33. See also Jackson *supra* n 32.

⁵³ V Fournier 'The appeal to 'professionalism' as a disciplinary mechanism' (1999) 47 *Sociological Review* 280, 281.

⁵⁴ Mangan *supra* n 36.

⁵⁵ Fournier *supra* n 53 at 281.

⁵⁶ J Evetts, 'The concept of professionalism: Professional work, professional practice and learning.' *International handbook of research in professional and practice-based learning* (2014) 29-56. See also Fournier *supra* n 53 and Evetts *supra* n 47.

⁵⁷ Mangan *supra* n 36 at 811.

⁵⁸ K MacDonald, *The Sociology of the Professions* (1995) 7.

continuously negotiated.⁵⁹ The conferral of professional status will therefore be dependent on how the public 'monitor, assess and evaluate' the occupational group.⁶⁰

A second way in which claims to professionalism can manifest is as a disciplinary mechanism⁶¹ imposed from above. Here, claims to professionalism create an imperative within the occupational group to assume 'appropriate professional identities'⁶² which again will be informed by the lay or folk understanding of those identities. Drawing on Foucault's ideas on governmentality, Fournier illustrates how discourses of professionalism can potentially facilitate 'control at a distance by inscribing the disciplinary logic of professionals within the person of the employees so labelled'.⁶³ Interestingly (and with particular regard to police claims to professionalism considered below) Fournier suggests that such disciplinary mechanisms may hold appeal to occupational groups in which it is harder to control employee conduct by more direct means.⁶⁴

Both types of claims to professionalism draw extensively on the classic (albeit contested) understanding of professional standing. It is valuable therefore to consider some elements of that model in greater depth. Three particularly interconnected components of professionalism are significant for our purposes here. These are the *complexity* and *nature* of the tasks undertaken, the quality of the *relationship* between professional and client, and the *authority* with which professional judgment is imbued.

Regarding the complex nature of professional work, Freidson uses the example of a pin maker. If one focuses on quality and efficiency of production, the skill of an individual pin maker, no matter how well trained or hardworking, is unlikely to compete with pin production via a series of workers doing individual mechanised tasks.⁶⁵ By contrast, the knowledge and skills required for professional tasks are complex in that they cannot be standardised in this way. Instead, the professional draws on a combination of high levels of general knowledge and specialised training to deliver individualised solutions to the issues with which s/he is confronted.⁶⁶ Professional endeavour combines both specialised formal knowledge and tacit intellectual skills⁶⁷ which the professional alone has in relation to that particular area of work. This however is not of itself enough to mark professions out from other occupational groups. It is also in the nature of professionalism that the area of social

⁵⁹ Fournier *supra* n 53 at 286.

⁶⁰ MacDonald *supra* n 58 at 7

⁶¹ Evetts *supra* n 47 at 408.

⁶² Fournier *supra* n 53 at 290.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Freidson *supra* n 39 at 111.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 32.

activity combines the need for individualised attention with an overarching concern for the public interest.⁶⁸ As Marshall remarks: 'The guilty criminal wants an acquittal, but what he needs, and what his lawyer must give him, is a fair trial'.⁶⁹ Professional endeavour therefore implicitly entails the squaring of individual needs with the public good and the individualised attention of a professional has to be 'conceived of in social terms'.⁷⁰

The nature of the professional realm marks the *relationship* between professional providers and their clients as distinct from other commercial and/or service relationships. The complexity of the tasks makes the nature of what is being done inaccessible to anyone from outside the professional group. They and they alone possess the knowledge and skill required to address the issues. Therefore, the client must trust the professional not only in relation to the degree of expertise they will exhibit, but also at an individual level.⁷¹ Particularly in the archetypal professions of law and medicine, the performance of professional tasks requires the client or patient to engage with and trust the practitioner by divulging personal details in respect of which professional skill and knowledge can be applied.⁷² The professional is asked to show judgement and understanding of human nature as well as command of the knowledge expected in their sphere of expertise; to this extent their whole personality must enter their work.⁷³ Hence, one element of the mystique of professionalism is that what we ask of a professional cannot be bought - it can only be given.⁷⁴

The requirement for a relationship of trust is, in turn, very much connected with the third key element of claims to professionalism, namely the *authority* with which professional advice is imbued. That professionals' level of expertise is unique to that occupational group and area of practice inevitably gives their advice something of a commanding quality.⁷⁵ This authority is further enhanced by claims to altruism in the exercise of their functions. Freidson refers to professionalism as a 'secular calling'⁷⁶: 'The professional ideology of service goes beyond serving others' choices. Rather it claims devotion to a transcendent value which infuses its specialisation with a putatively higher goal [...] Justice, Salvation, Beauty Truth, Health'.⁷⁷ Thus, a claim to professionalism is also a claim to authority based on the unique level of expertise asserted, combined with the public role the professional purports to assume and further heightened by the assertion of some benevolent

⁶⁸ Marshall *supra* n 37 at 328. See also Evetts *supra* n 47 at 400.

⁶⁹ Marshall *supra* n 37 at 330.

⁷⁰ Marshall, *supra* n 37 at 332.

⁷¹ *Ibid* at 328.

⁷² Evetts *supra* n 47 at 400.

⁷³ Marshall, *supra* n 37 at 328.

⁷⁴ *Ibid*.

⁷⁵ Parsons *supra* n 35 at 38.

⁷⁶ Freidson *supra* n 39 at 107.

⁷⁷ *Ibid* at 122.

metaphysical end. Authority of this nature is inevitably difficult to question. Designations of professionalism not only confer higher standing but help to shield professionals from excessive external scrutiny. This becomes clearer when we look at how notions of professionalism have operated in negligence law.

3 Professional Negligence

A significant hallmark of 'the professions' which has understandably not featured in the sociological literature is that the occupational activities of professionals often attract differential treatment in the courts. In particular, the archetypal professions of medicine and law have both enjoyed some level of judicial protection. Thus the case of *Bolam v Friern Hospital Management Committee*⁷⁸ doctrinally enshrined a 'hands-off' approach to judicial scrutiny of medical decision-making while the conduct of cases by legal advocates has until relatively recently benefited from various levels of liability immunity.⁷⁹ Arguably, some differential treatment by the courts is an inevitable consequence of the nature of the professional role. While a shop keeper or a building contractor may be in a position to guarantee their product, a doctor cannot promise a full recovery and the outcome of a trial will often turn on matters beyond the control of the advocate.⁸⁰ Hence a starting assumption of law is that those who enter 'learned profession[s]' do 'not undertake to use the highest possible degree of skill but ... to bring a fair, reasonable and competent degree of skill'.⁸¹ This approach should however be viewed in light of the nature of the professional realm, which as noted above, encompasses both collective and individual dimensions. Professionals need the collective authority of their standing to instil the individual trust essential to the proper performance of their role in particular instances. The differential treatment of professional groups as a whole in relation to negligence claims may therefore be linked, at least in part, to concerns that questioning professional authority is not in the collective interest.

Nevertheless, and in line with the changing perceptions of professionalism noted above, the courts have increasingly felt the need to reframe and/or revisit justifications for professional immunity or protection in relation to negligent professional conduct. They have gradually drawn back from the deferential approach to professional judgement evidenced in *Bolam*, most notably in *Bolitho v City*

⁷⁸ [1957] 1 WLR 582.

⁷⁹ See especially *Rondel v Worsley* [1969] 1 AC 191 and *Arthur Hall v Simons* [2002] 1 AC 615 (discussed below). For detailed discussion of the law on professional immunities, see M Davies, *The Law of Professional Immunities* (2014).

⁸⁰ R Jackson and J Powell, *Jackson and Powell on Professional Liability* (2012) 2-004.

⁸¹ *Lanphier v Phipos* (1838) 8 C & P 475.

and Hackney Health Authority.⁸² The status and application of the *Bolam* principle has been further eroded in the recent case of *Montgomery v Lanarkshire Health Board*⁸³ in which the doctrine of informed consent has been judicially reworked better to encompass the viewpoint and needs of the (reasonable) patient facing treatment. This latter development is indicative of a trend towards greater recognition of individual interests, hitherto treated as secondary to the collective interest in the smooth running of the general professional endeavour.

Changes to the privileges enjoyed by the legal profession are also of interest. Historically, barristers were immune from suit altogether.⁸⁴ In the eighteenth century the notion that an action might be brought against a barrister for negligent drafting was found objectionable and Jackson refers to an undercurrent in such cases that ‘the very idea of suing a gentleman of the bar was unthinkable’.⁸⁵ By 1969, however, it was necessary to give the unthinkable some thought. In *Rondel v Worsley*, prior deference to gentlemanly standards was replaced by policy concerns that the administration of justice would be hampered if barristers were unable to present their case ‘fearlessly and independently’.⁸⁶ It would not be in the public interest, their Lordships argued, for the conduct of barristers to be questioned since it would lead to the re-trying of actions and prolonged litigation. Thus, the public interest in the proper administration of justice was seen to take precedent over the individual right to compensation.⁸⁷ Subsequently, and perhaps not unrelated to the changing conceptions of professionalism noted above, such arguments in support of professional immunities have become increasingly difficult to sustain. *Hall v Simons*⁸⁸ marks the point at which the policy concerns underpinning the decision in *Rondel v Worsley* were held insufficient to defeat the overarching requirement of justice that a wrong must be righted:

The principle is now clearly established that where a person relies on a member of a profession to give him advice or otherwise to exercise his professional skills on his behalf, the professional man should carry out his professional task with reasonable care and if he fails to do so and in consequence the person who engages him or consults him suffers loss, he should be able to recover damages. This principle accords with what members of society

⁸² [1998] AC 232 where Lord Browne-Wilkinson asserted: ‘if in a rare case it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible’ (at 233).

⁸³ [2015] UKSC 11.

⁸⁴ *Fell v Brown* (1791) Peake 131.

⁸⁵ Jackson *supra* n32 at 134.

⁸⁶ [1969] 1 AC 191, 231.

⁸⁷ *Ibid*; see in particular per Lord Reid at 227-232 and Lord Morris at 249-253. See also Lord Upjohn stressing the uniqueness of the barrister’s position in the administration of justice – it is not like other professions (at 281) and the duty to court transcends the primary duty to the client (at 282).

⁸⁸ *Hall v Simons* [2002] 1 AC 615

now expect and consider to be just and fair, and I think that it is difficult to expect that reasonable members of society would accept it as fair that the law should grant immunity to lawyers when they conduct a civil case negligently, when such immunity is not granted to other professional men, such as surgeons, who have to make difficult decisions in stressful conditions.⁸⁹

Meanwhile, as regards solicitors, their professional status and role in the community have been cited as reason for extending their liability for omissions in certain circumstances. Both factors were significant in driving the decision in *White v Jones*⁹⁰ that a duty of care was owed to the would-be beneficiaries of a will which remained undrafted due to a negligent delay on the part of the lawyer. Here the practical justice of the situation necessitated a search for ways to overcome the contractual and tortious barriers to finding a duty. According to Lord Goff, a substantial element of that practical justice encompassed the right of citizens to leave their assets to whom they please and the importance of this at a general social level: 'legacies can be of great importance to individual citizens, providing very often the only opportunity for a citizen to acquire a significant capital sum; or to inherit a house, so providing a secure roof over the heads of himself and his family; or to make special provision for his or her old age'.⁹¹ It was vital therefore to recognise the important role that solicitors play in society and the dependency of the public on the maintenance of professional standards of legal service.⁹² The inability of a frustrated beneficiary to bring a claim would mean that these important public professional functions could be negligently performed with impunity. Similar concerns emerge in the judgment of Lord Brown-Wilkinson asserting that 'the solicitor by accepting the instructions [of the testator] has entered upon, and therefore assumed responsibility for, the task'.⁹³ In other words, the public importance of the professional role at a general level justifies the imposition of a duty of care in an individual instance notwithstanding the lack of formal correspondence to traditional contractual and tortious principles. *White v Jones* thus highlights how the understanding of professional status increasingly carries with it a presumption that an individual remedy in relation to professional misconduct can serve important public functions. This is a stance of particular significance with regard to the arguments propounded below.

4 Professionalism, policing and the courts

⁸⁹ *Ibid* at 728 (per Lord Hope).

⁹⁰ [1995] 2 AC 207.

⁹¹ *Ibid* at 260.

⁹² *Ibid*.

⁹³ *Ibid* at 274.

It has already been acknowledged that policing stands outside the archetypal professions of law and medicine in relation to which professional negligence principles have traditionally been developed. Indeed, until the second half of the twentieth century, tort engaged not with policing as a profession or occupation but with individual office holders, drawing on a historical legacy deriving from the 'office of constable' (along with the 'original' authority that office conferred).⁹⁴ The development of a police organisational identity during the nineteenth and twentieth century gradually changed the nature of the police constable's role and his relation to the community to which he was formally accountable. Remarkably though, until the second half of the twentieth century, the formal legal and policy position was that officers did not act as servants or agents of government bodies,⁹⁵ and the vicarious liability of Chief Constables for the tortious acts of police officers was not introduced until the Police Act 1964.

It should not therefore be surprising to learn that negligence claims against the police for failing adequately to carry out their core functions of investigating and suppressing crime only began to emerge in the second half of the twentieth century. Some kinds of claims, involving the negligence of individual officers, for example in managing a dangerous traffic situation, were easily absorbed within the core doctrinal framework.⁹⁶ Even the Hillsborough claim, alleging that police negligence, in the form of poor crowd control, led to the death of numerous football fans in the Hillsborough stadium, did not present difficulties other than the extent to which the duty of care the police plainly owed in relation to physical harm extended to encompass psychiatric harm.⁹⁷ However, when Jacqueline Hill's mother lodged her claim against the Chief Constable of West Yorkshire Police for failing to prevent her daughter from being murdered by a notorious serial killer, who (as it turned out) the police had interviewed numerous times before Ms Hill was murdered, she broke new ground.⁹⁸ Mrs Hill sought to call the police to account for the lack of due care and skill they exhibited in carrying out their core investigative and crime-suppressing functions. It was not that they had carried out a negligent act while engaged in policing activities; it was that their policing *per se* was negligent: the police had failed to meet the standards of policing to which Mrs Hill and her daughter were entitled to expect.

The way in which this novel claim was approached in *Hill* has turned out to be of huge significance. From a doctrinal perspective, the issue was conceived in terms of liability for third party acts. Thus

⁹⁴ See further P Rawlings, *Policing: A Short History* (2001).

⁹⁵ See especially *Fisher v Oldham* [1930] 2 KBD 364, supporting the view that an officer's authority was 'original', not 'delegated' and exercised by virtue of his 'ministerial office'.

⁹⁶ See eg *Knightly v Johns* [1982] 1 WLR 349.

⁹⁷ *Alcock v CC of South Yorkshire* [1992] 1 AC 310.

⁹⁸ *Hill* (*supra* n 8).

Lord Keith, recognising the indirect nature of the harm alleged, stressed the need for some element of ‘proximity of relationship’ over and above the mere fact of foreseeability of harm to warrant imposing a duty.⁹⁹ At the same time, judicial discomfort with recognising a duty of care in *Hill* clearly extended beyond a concern to avoid holding one person liable for the criminal acts of another: it was the very fact that the police are charged with preventing criminally inflicted harm that gave judges in *Hill* and subsequent cases pause for thought. Is it in the public interest, Lord Keith speculated, to impose liability and thus encourage the police to observe ‘a higher standard of care’?¹⁰⁰ This is the critical moment when notions of professionalism might have but did not enter the realm of consideration – or, at least, not explicitly. As we know, Lord Keith went on to give a number of public policy reasons why a duty of care should not be imposed on the police in relation to their investigative and crime-suppressing functions;¹⁰¹ and these concerns continued (albeit in attenuated form after *Brooks*)¹⁰² to shape the outcome of subsequent litigation at least until *Michael*.¹⁰³ However, it is Lord Keith’s concluding comments in *Hill* which are perhaps most intriguing:

I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal... in the present case, was right to take the view that the police were *immune* from an action of this kind on grounds similar to those which in *Rondel v Worsley* ... were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.¹⁰⁴

This use of the term ‘immunity’ has been the source of much subsequent trouble, drawing strong criticism from Lord Toulson in *Michael* who observes he would have much preferred if Lord Keith had not strayed into the realms of policy at all.¹⁰⁵ However, what is interesting for our purposes here is the analogy Lord Keith invokes in *Hill* between barristers, on the one hand, and police officers on the other. *Rondel v Worsley*,¹⁰⁶ as we have seen, offers a justification for departing from the general principle that professionals owe a duty to exercise reasonable care and skill in their professional calling based on purported considerations of public interest. The denial of liability in *Hill* is therefore analogically linked to the public nature of the service police perform, and its fundamental significance to the community.

⁹⁹ *Hill supra* n 8 at 60.

¹⁰⁰ *Ibid* at 63.

¹⁰¹ *Ibid* and see section 1 above.

¹⁰² *Supra* n 18.

¹⁰³ *Supra* n 10.

¹⁰⁴ *Supra* n 8 at 63-64.

¹⁰⁵ *Supra* n 10 at para 44.

¹⁰⁶ *Supra* n 79.

We have then two rationales which, at the point of *Hill*, appear to be aligned: the argument from principle, which draws upon prevailing notions of when a duty of care should be imposed, and relies in particular on the notion of proximity; and the argument from policy, or public interest, which purports to justify an immunity from application of ordinary common law principles. This contingent alignment in *Hill* belies a tension at the heart of Lord Keith's argument which is how far considerations of public interest should override the application of ordinary common law when policy and principle veer in *different* directions. This tension is subsequently laid bare in *Osman v Ferguson*,¹⁰⁷ another case in which the police failed to protect a crime victim, this time in circumstances where they were aware both of the risk to a particular victim and from whom the risk emanated. In *Osman*, the application of principle appeared to point in favour of a duty, McCowan LJ observing: 'In my judgment the plaintiffs have therefore an arguable case that as between the second plaintiff and his family, on the one hand, and the investigating officers, on the other, there existed a very close degree of proximity amounting to a special relationship.'¹⁰⁸ This finding notwithstanding, the Court of Appeal went on to hold that for the policy reasons outlined in *Hill*, no duty arose.¹⁰⁹ In other words, policy trumped principle, or, to express it in terms similar to those which featured in *Hill*, the public interest in effective policing justified a regime of special protection for police officers regardless of what a purely principled analysis would dictate.

This protectionist approach continued in *Brooks* and *Smith*. *Brooks* is quite a different kind of claim from that in *Hill* and *Osman* in that the alleged negligence lies not in a police failure to protect an individual from third party criminal acts but from failings in the handling of the subsequent investigation. Essentially, what Duwayne Brooks was alleging was that the police had treated him unprofessionally.¹¹⁰ Specifically they had breached a common law duty to take reasonable steps (1) to assess whether he was the victim of a crime and then to accord him reasonably appropriate protection, support, and assistance, (2) to afford him the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence and (3) to afford reasonable weight to the account that he gave of events and to act on it accordingly.¹¹¹ These claims have more than a whiff of allegations of professional misconduct. Moreover, and this point of critical importance is sadly dismissed by their Lordships,¹¹² resolution of the claim in *Brooks* is in no way

¹⁰⁷ [1993] 4 All ER 344 (CA).

¹⁰⁸ *Ibid* at 350.

¹⁰⁹ Per McCowan LJ 'In my judgment the House of Lord's decision on public policy in *Hill* dooms this action to failure' (at 354).

¹¹⁰ *Supra* n 18. Lord Bingham puts it thus: 'the investigation was very badly conducted and the respondent himself was not treated as he should have been' at para 1.

¹¹¹ *Ibid* at para 2.

¹¹² See the observations of Lord Steyn *ibid* at para 32.

reliant on the legal principles pertaining to liability for third party criminal acts. Yet, the court repeatedly invoke the ‘the principle in *Hill*’s case’¹¹³ to deny a cause of action. Reliance on policy/public interest here is absolute and further problematised by the fact that, at the time *Brooks* was heard, *Rondel v Worsley* had already been overturned by *Hall v Simon*.¹¹⁴ Their Lordships handle this (as well as the difficulty with the European Court of Human Rights triggered by Lord Keith’s formulation of the approach in *Hill* as an ‘immunity’ rather than as ‘an absence of a duty of care’)¹¹⁵ by holding out the possibility that a police duty of care *might* be recognised in some notional unspecified future circumstances.¹¹⁶ In the meantime, the desirability of having police officers treat victims and witnesses properly is reframed by Lord Steyn as an ‘ethical value’ which does not extend to a legal duty to take care.¹¹⁷

Perhaps sensing that this is an unsatisfactory base upon which to ground an expectation that the police treat people properly, Lord Rodgers offers some interesting further elaboration of the nature of police duties in this regard. ‘Police officers’, he argues, are ‘under an ethical and professional duty to act with due care’.¹¹⁸ It is, he continues, ‘a matter of professional ethics but does not translate into a legal duty of care to the defendant’.¹¹⁹ What work is the notion of professionalism doing in this context? In our view, its purpose is to imbue the appeal to ethics with additional weight by attaching it to professional standards: because the police have a professional duty, they do not have a legal one, the mediation of public (collective) interest and private (individual) justice being achieved by invoking the moral purpose of the professional actor.

In *Smith v Chief Constable of Sussex Police*¹²⁰ this tension between public and private, collective and individual interests, is even further exposed in the courts’ deliberations. The facts in *Smith* might be thought to present exactly that kind of ‘outrageous’ or ‘exceptional’ circumstance envisaged by Lord Steyn in *Brooks* as falling beyond the reach of the *Hill* principle. A case of domestic violence in which the police repeatedly ignored and downplayed the concerns of the claimant, who was later subject to a serious attack by his ex-partner, *Smith* evidences an unforgivable level of negligence on the part of the police – and their Lordships knew it. Thus Lord Hope laments the ‘highly regrettable failure [by

¹¹³ *Ibid* at paras 30, 31 and 33.

¹¹⁴ *Supra* 88 and accompanying text.

¹¹⁵ *Brooks*, *supra* n 18 at para 27.

¹¹⁶ *Ibid* at para 34: ‘it is unnecessary in this case to try to imagine cases of outrageous negligence by the police unprotected by specific torts which could fall beyond the reach of the principle in *Hill*’s case. It would be unwise to predict accurately what unusual cases could conceivably arise. But such exceptional cases on the margins of the principle in *Hill*’s case will have to be considered and determined if and when they occur.’

¹¹⁷ *Ibid* at para 30.

¹¹⁸ *Ibid* at para 38.

¹¹⁹ *Ibid*.

¹²⁰ *Supra* n 9.

the police] to react to a prolonged campaign ... threatening the use of extreme criminal violence'¹²¹ while Lord Phillips explicitly acknowledges that 'the lack of action on the assumed facts of this case come close to constituting the "outrageous negligence" that Lord Steyn contemplated as being potentially outside the reach of the principle in *Hill*'s case'.¹²²

Nevertheless, and with the exception of Lord Bingham, the House turned its back on individual justice and reasserted the public interest in legally uninhibited policing in uncompromising terms. According to Lord Hope, the principle in *Hill*, defended so vigorously by Lord Steyn in *Brooks*, 'had been enunciated in the interests of the whole community', with 'the greater public good outweigh[ing] any individual hardship'.¹²³ These points are endorsed by Lord Carswell who appeals to 'the interests of the wider community' to justify the hardship that the *Hill* principle inflicts on individual claimants.¹²⁴ By contrast, Lord Bingham has reached the limits of his tolerance of the injustice that *Hill* appears to necessitate, arguing strongly for an exception in the form of his 'liability principle', understood in the following terms:

If a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such a threat and, if appropriate, take reasonable steps to prevent it being executed'.¹²⁵

While perhaps not the most elegantly crafted solution to the dilemma of justice posed by *Hill*, the narrow scope of Lord Bingham's liability principle presents the possibility of tempering the over-inclusiveness of *Hill* without fundamentally threatening the public policy concerns asserted to underpin it. Moreover, as Lord Bingham himself points out, public policy concerns also militate in favour of redress: 'the public policy consideration which has the first claim on the loyalty of the law is that wrongs should be remedied and very potent considerations are required to override that policy'.¹²⁶ Strikingly, that point seems to have been lost in much of the discussion of the scope and application of the *Hill* principle. Of greater significance for our purposes here is Lord Bingham's remarks about how the liability principle might be operationalised as a legal standard. Responding to the criticisms of his judicial brethren that the principle is vague and unworkable he says this:

¹²¹ *Ibid* at para 72.

¹²² *Ibid* at para 101.

¹²³ *Ibid* at para 75.

¹²⁴ *Ibid* at para 106.

¹²⁵ *Ibid* at para 44.

¹²⁶ *Ibid* at para 56.

Who they ask is to judge whether the evidence is apparently credible? Who is to judge whether the threat is imminent? *The answer is that given in any case where it is said that a professional should have been alerted to and should have responded to a risk.* In first instance the judgment is made by the professional in question. If that judgment is challenged, a judge must decide.¹²⁷

In these key comments, the concept of professionalism performs two related tasks. On the one hand it allows Lord Bingham to align policing with other professional roles and intimate thereby that similar standards of professionalism should apply. On the other hand, it invites the professional to play a central role in articulating professional standards, in this context, in judging when evidence is credible or a threat assessed to be imminent. Judicial angst about the appropriateness of interfering in matters of operational policing is thereby at least potentially diffused, although sadly for Mr Smith, not sufficiently to prompt their Lordships to accept Lord Bingham's compromise. The conclusion of *Smith* is thus highly unsatisfactory as the '*Hill* principle' drifts even further away from its original moorings, losing sight of its purpose, scope and limitations in the broader context of civil justice.

5 The police as 'professionals'

To recap so far, we have seen that professionalism is a nebulous and contested concept which varies over time and place, both in meaning and significance. We have explored the implications of professional status for standards of legal liability, noting a judicial shift away from a traditional protective stance towards a greater willingness to challenge and scrutinise professional practices. We have examined the existing case law to see whether and how notions of professionalism inform judicial decision-making about police liability. We have found that professionalism does figure, though not significantly, in the relevant legal judgments but also that it has been invoked both for and against recognition of a duty of care in relation to core police functions. At this point we propose to probe the idea of the police as professionals a bit further - to consider what professional policing means and what the police seek to gain from making claims to professional status. This might help in determining whether recognition of a duty of care is, or ought to be, an inherent feature of police claims to professionalism.

Many aspects of policing have historically shared characteristics with the rough sketch of professionalism set out above. Although policing is a necessarily contested and conflict-ridden

¹²⁷ *Ibid* at para 59 (our emphasis).

process, the police are commonly understood to operate in the public interest. In addition, as ‘street level bureaucrats’, officers on the beat have always had considerable control over their work and exercise high levels of discretion.¹²⁸ Furthermore and subject to some exceptions, the police have tended to adopt the view that those with operational experience are best placed to judge officers’ conduct.¹²⁹ Further still, in line with Friedson’s characterisation of professionalism as a ‘secular calling’, Herbert notes how police adherence to a ‘bad apple’ view of criminal activity as morally repugnant, permits them to construct their own role as a ‘virtuous attempt to protect an otherwise vulnerable public’.¹³⁰

Police claims to professionalism have received significant parliamentary backing in recent years. In 2010 the Coalition Government ordered a Review of Police Leadership and Management.¹³¹ In response the College of Policing was established in 2012 as a professional body for policing with responsibility for overseeing entry qualifications and overall ‘professional development’.¹³² In this capacity it has recently announced the licensing of officers with particular expertise in child sex abuse cases¹³³ and an expectation that by 2020 all entrants into the police will be graduates.¹³⁴ Furthermore, the College maintains a register of all officers who have been dismissed from the police service, or who resign or retire while subject to gross misconduct investigation¹³⁵ and this has been given formal statutory footing as a ‘police barred list’ which prevents those on the list from being re-employed as officers.¹³⁶ The existence and work of the College contributes substantially to those structural arrangements which are the hallmark of professions. It incorporates both the management processes associated with instilling the discipline of professionalism from above, and is increasingly the structural embodiment of the claim to professionalism from within. The status of the College itself is consequently important as regards the professional standing of the police; significantly, there have been recent calls in Parliament to rename it the Royal College of Policing.¹³⁷

¹²⁸ M Lipsky, *Street-level Bureaucracy* (1980) at 190.

¹²⁹ For an interesting discussion of police perspectives see R Reiner ‘Multiple Realities, Divided Worlds: Chief Constables’ Perspectives on the Police Complaints System’ in A Goldsmith, ed, *Complaints Against the Police: the Trend Towards External Review* (1991) at p286-300.

¹³⁰ Friedson *supra* n 39 at 483; S Herbert ‘Tangled up in blue: Conflicting paths to police legitimacy’ (2006) 10*Theoretical criminology* 481, 483.

¹³¹ *Review of Police Leadership and Training by Peter Neroud QPM* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118222/report.pdf

¹³² *Ibid* at 15-16.

¹³³ http://www.college.police.uk/News/archive/November_2016/Pages/vulnerability_for_policing.aspx.

¹³⁴ <http://bbc.co.uk/news/uk-38319283>.

¹³⁵ <http://www.college.police.uk/What-we-do/Ethics/integrity-in-policing/Pages/Dismissal-of-Officers-for-Gross-Misconduct.aspx>.

¹³⁶ See Schedule 8, s88C of the Policing and Crime Act 2017.

¹³⁷ Hansard, HC Vol 607 col 68 (7 March 2016).

What then are the characteristics of a professional officer? What important qualities (over and above the structural mechanisms in place) justify professional status? Muir's classic study of police as 'streetcorner politicians' classifies the professional officer as one whose intellectual approach to interactions with the public is infused with an understanding of the complexity of human relations and social interdependence and who can incorporate the use of coercive force within an overarching moral code.¹³⁸ This involves substantial situational expertise, leading to a nuanced appreciation of the police role encompassing the ability to 'extort' compliance with requests. Muir's professional officers realise 'that however degenerate a person might appear, they would still value something or someone or some idea that if threatened would coax them into compliance'.¹³⁹ In other words, a key element of the expertise of professional officers lies in an ability to build relationships which facilitate the acquisition of operationally pertinent information.

Reiner recognises the same type of officer but uses the label 'bobby' for that set of 'professional' characteristics.¹⁴⁰ For Reiner the professional officer adopts a managerial approach to the role: 'The keynote to this category is "judiciousness"'.¹⁴¹ Professional officers 'exhibit an appropriately balanced appreciation of the value of all aspects of policing' and are equipped for the 'largely public relations functions of senior ranks'.¹⁴² Hence the 'professional' nature of policing can vest in both the nuanced individual or local relationships highlighted by Muir *and* the ability to foster the general public confidence in the police as an organisation emphasised in Reiner's characterisation. This aligns with an understanding of the complex nature of policing which recognises that the police seek specific order by limiting and controlling particular incidents of criminal conduct and breaches of the peace while also contributing to general order by their symbolic role as regards social cohesion.¹⁴³ However, these two critical elements of policing are neither distinct nor indeed separable.

If we accept policing as a professional endeavour, it is nonetheless distinct from other professions because of the unique extent to which the police are dependent on their relationship with the public in order to perform both their specific and general responsibilities. While ultimately they can resort to the use of state-sanctioned force, they are in practice dependent on compliance with requests as regards day-to-day issues of public order. Further, they rely on the public to come forward with

¹³⁸ W Muir, *Police: Streetcorner Politicians* (1979) 3-4.

¹³⁹ P Waddington, 'Revisiting the Classics: Police: Streetcorner Politicians: William K. Muir.' *Policing and Society* ((2015) 25 (6)) 681, 682.

¹⁴⁰ R Reiner, *The Politics of the Police* (4th edn, 2010) at 133.

¹⁴¹ R Reiner, *The Blue Coated Worker* (1978) at 265.

¹⁴² Reiner, *supra* n 140 at 433-34.

¹⁴³ N Walker 'Defining core police tasks: The neglect of the symbolic dimension?' (1996) 6 *Policing and Society* 53.

information making their crime control function possible.¹⁴⁴ For policing then, the importance of those professional elements of *expertise* and *relationship*, highlighted in section 2 are specifically interwoven and a significant part of the expertise of policing lies in creating, promoting and fostering good relationships with the public, individually, through local and community outreach, and through efforts to maintain overall public confidence in the police as an institution. The fact of good professional conduct on the part of officers undoubtedly assists with this at every level; but the very *label* of professionalism also has significant instrumental impact and is arguably part of what the police seek to gain by asserting professional status.

From a management perspective, the ability to use claims to professional status as a means of ‘inscribing the disciplinary logic of professionals’¹⁴⁵ is a potential means of influencing police occupational culture in positive ways. Similarly, while calls from within the police for recognition of professional status no doubt encompass a desire for the prestige associated with the classic model, such recognition also has other advantages. These include justifying limited external scrutiny.¹⁴⁶ However, professional status can also serve ‘deeply functional’ operational ends.¹⁴⁷ Officers have to face emotionally charged and violent, or potentially violent, situations. They perceive the ability to take command and ‘dictate the flow of action’ as limiting their vulnerability in such circumstances.¹⁴⁸ The additional authority required to achieve this is not born of their coercive powers alone or of all those elements of good policing that are aligned with professional conduct, but also stems from the status consequent upon being seen as a profession. In sum, while the police do have authority by virtue of their office and powers, claims to professional standing are claims for a different, additional level of authority. Claims to professionalism are claims to a certain form of legitimacy which is founded on a degree of competence in a particular area and needs to be continuously negotiated.¹⁴⁹ An issue to consider then is whether being subject to a duty of care in negligence would assist in that ‘negotiation’.

6 The role of the duty of care in the negotiation of police professional status

6.1 Professional policing and public policy considerations

¹⁴⁴ T Tyler ‘Enhancing Police Legitimacy’ (2004) *Annals of the American Academy of Political and Social Science* 84, 85.

¹⁴⁵ Fournier *supra* n 53 at 290.

¹⁴⁶ Herbert *supra* n 131 at 482, 488.

¹⁴⁷ *Ibid* at 482.

¹⁴⁸ *ibid*.

¹⁴⁹ Fournier *supra* n 53 at 286.

The importance of the status of the police to processes of policing bears on the legal arguments regarding the imposition of a duty of care with respect to core police functions. Consider first the ‘*Hill* principle’, at the heart of which is a determination that the interests of the community as a whole are not served by acknowledging a police duty of care owed to individual members of the public. This breaks down into four related policy arguments reflected in the relevant judgments.¹⁵⁰ These are: (1) that the imposition of a duty would not improve police standards; (2) that to impose a duty would be detrimental (to the public at large) because it might result in defensive policing strategies; (3) that the operational independence of the police renders police decision-taking unjusticiable; and (4) that to permit a duty would unhelpfully divert police resources towards dealing with the resultant litigation. Significantly, each of these arguments presupposes that the interests of individual claimants must cede to the collective interest in effective policing. The judicial approach is to ‘balance’ the interests in conflict, determining in favour of the more weighty concern. Is this however the right/best way to frame the dilemma these cases appear to pose? Arguably, such reiterations of interests in conflict fails to recognise the interdependency of collective and individual concerns in the context of modern policing, the extent to which, as explored above, professional policing requires relationship-building at the individual/community level and public confidence at the social/institutional level. By drawing out the tensions and complexities which the process of policing entails, the lens of professionalism enables us to interrogate the structure and content of judicial postulations which have not received the scrutiny they warrant, given the work they have been called upon to perform in the courtroom.

Let’s look again at first two policy considerations, namely, that a duty of care would not lead to an improvement in standards and could encourage defensive policing. One of the potential benefits to the police of the imposition of professionalism from above is that it engenders the development of mechanisms of self-governance, encouraging individual officers to exercise personal discipline and thus achieve the ‘professional standards’ required by the organisation. In this context, the imposition of a duty of care could constitute one such disciplinary mechanism, helping to set and maintain professional standards in the context of police interactions with members of the public. Seeking to achieve this is arguably of greater significance in the context of policing than in other professional contexts. I may reach a full recovery sooner and my overall suffering may be reduced on account of the sense of wellbeing imparted by my surgeon demonstrating genuine interest in and concern for my welfare. However, as long as she has performed the surgery within acceptable boundaries of technical skill, the lack of ‘true professionalism’ manifest in her clear indifference to

¹⁵⁰ See *supra*, text accompanying nn 14-24.

me as a person is not appropriately the subject of suit. The difference between surgery and policing however is that, for the latter, the quality of the relationship is fundamental to the process at every level. Thus, invoking law to set at least the outer limits of acceptable conduct could very likely lead to improvements in (professional) standards.

Similar arguments can be made in relation to defensive policing. The judicial concern here is that the ability of the police to make sound operational decisions will be impeded by the fear of litigation, tilting the balance unduly in favour of individual as opposed to collective considerations.¹⁵¹ However, policing is a necessarily public and - in an era of smartphones and attentiveness to social media – increasingly visible activity in which individual interactions often assume more general significance. The easy opposition of individual and public interests fits poorly within an operational context in which the two are more commonly critically connected. Put simply, if we recognise that reputational and relational issues are at the forefront of professional policing, ‘defensive’ and ‘professional’ policing look more in alignment than in tension. In any event, fears about the untold damage inflicted by the threat of litigation have not been borne out in other professional contexts.¹⁵²

The final two policy considerations comprising the ‘*Hill* principle’ relate to organisational aspects of policing. One concern here is that being subject to a duty of care would result in limited police resources being directed towards defending negligence claims and thereby diverted from core police tasks. In this regard Tofaris and Steel rightly point out that the depth of investigation and disclosure required for litigation may bring about positive improvements in police practice as well as savings in overall public resources.¹⁵³ The relationship between complaints investigations and claims for damages for intentional torts provides some empirical evidence that their suggestions are valid. In particular, studies in the US have revealed that the heightened level of scrutiny inherent in the litigation process often brings to light significant failings in internal complaints investigations.¹⁵⁴ While, there are other factors to consider in relation to the level of investigation in the context of police complaints, this evidence certainly heightens the need for those who argue that the imposition of a duty of care in a narrow range of circumstances would be detrimental, to produce evidence in support of that contention. In any event, we would argue that a commitment to the imposition of professional discipline from above should entail welcoming the additional scrutiny.

¹⁵¹ See in particular concerns expressed by Lord Steyn in *Brooks* and reproduced *supra* in text accompanying n 21.

¹⁵² Tofaris & Steel *supra* n 26 at 134.

¹⁵³ *Ibid* at 135.

¹⁵⁴ J Schwartz, ‘What Police Learn from Lawsuits’ (2011) 33 Cardozo L Rev 841.

Perhaps the most compelling policy concern expressed in *Hill* and subsequent cases relates to the appropriateness of subjecting police conduct and decision-making to judicial scrutiny. That the imposition of a duty of care would involve inappropriate judicial examination of matters of policy and the exercise of police discretion is correctly seen as an issue of justiciability.¹⁵⁵ However, according to Tofaris and Steel, the prevailing judicial approach to determinations of justiciability does not and should not preclude judicial oversight of policing in all circumstances.¹⁵⁶ In particular, while resourcing decisions and questions of strategy properly fall outside the bounds of justiciability, operational negligence, taking the form of poor policing by individual officers, arguably should not. It is true that in most of the cases which have come before the courts, strategic and resourcing factors lurk in the factual background; however, the nature of the negligence alleged is primarily operational: consider for example the poor handling of Mr Smith's complaint or the failure of communications systems which doomed Ms Michael's 999 call to inattention.

We would argue that the wide application of justiciability considerations and the corresponding accountability gap this creates undermines and impedes police claims to professional status. The claim to professionalism entails a representation of a degree of care and skill which is considerably higher than the bar set by *Wednesbury* unreasonableness (judicial review being the other primary legal mechanism for challenging police decision-making). This is not to deny that policing is complex and challenging, as is generally the case with professional roles. However, this does not mean that some degree of judicial oversight will not aid rather than inhibit good policing. For example, Her Majesty's Inspectorate of Constabulary (HMIC) recently published a report which was highly critical of the systems put in place by the Metropolitan Police as regards child sexual exploitation.¹⁵⁷ Recent years have seen a change in how this crime is perceived which impacts significantly on the appropriate police response. Successful prosecutions of sex-grooming gang members in Oxford were predicated on an understanding of the offence as serious organised crime rather than the easily dismissible individual complaints of underage 'slappers'.¹⁵⁸ This resulted in the deployment of entirely different investigative approaches than had hitherto been considered; it appears, however, these have not been successfully adopted by the Metropolitan Police.¹⁵⁹ In its response to the HMIC report, the Met pointed to the large number of operational strategies it had prioritised and how

¹⁵⁵ Tofaris and Steel *supra* n 26 at 134.

¹⁵⁶ *Ibid* at 148.

¹⁵⁷ Her Majesty's Inspectorate of Constabulary, 'National Child Protection Inspections: The Metropolitan Police Service, 1 February – 22 May 2016' (2016), available at <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/met-national-child-protection-inspection.pdf>.

¹⁵⁸ Home Affairs Select Committee, 'Child Sexual Exploitation and the Response to Localised Grooming' <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/68/68i.pdf>> at 31, 34.

¹⁵⁹ *Supra* n 162 at 40-49.

these had had important (albeit incidental) positive impacts on child safety.¹⁶⁰ This puts resource allocation front and centre of the Met's response, quite properly raising questions of justiciability in this context.

This does not mean that negligence law may not have a role to play even in these circumstances. The issue of policing priorities is enormously complex and dependent on a variety of long-term aims and short-term crises. Many diffuse concerns inform how the police focus their operational endeavours but professional policing encourages an approach to operational decision-making which aspires to high standards and is reflective about best practice in the field. Being subject to a duty of care in some circumstances does not have to entail intrusion into territory which should rightly be beyond judicial reach. It does however increase the pool of resources, the breadth of information about past institutional and operational failings, informing the exercise of reasonable care and professional judgment in individual cases in which justiciability considerations are not present.

6.2 Professional policing and arguments from principle

If considerations of professionalism militate against the public policy concerns underpinning the *Hill* principle, what, if any, implications do they have for the principle-based approach recently adopted in *Michael*?¹⁶¹ It will be recalled that the core of Lord Toulson's argument is that there is nothing about the police which sets them apart from ordinary members of the public when it comes to liability for 'pure omissions'.¹⁶² Putting to one side the fact that liability for omissions has not really featured in any of the previous case law – certainly not explicitly – it is interesting to reflect upon the top down, defendant-centred formulation of the problem by his Lordship. 'Should the police be held liable for omissions when ordinary citizens are not?' serves here both as a starting point and direction of travel. Lord Toulson's gaze is large scale and abstract, bypassing proximity by framing the issue so as to exclude the relational elements and position the police as lone actors in a hostile world. Liability cannot arise because there is nothing about the police which sets them apart from the tortious principles that apply to ordinary members of the public. The police (understood either as individual officers or as an organisation) are the focus rather than the role and process of policing. In contrast, Lord Bingham's liability principle in *Smith*¹⁶³ or the formulation favoured by Lord Kerr in *Michael*, which relies on establishing proximity of relationship,¹⁶⁴ start from the bottom up. Their small scale gaze focuses first on the individual harmed: Could it be right that such egregious failures

¹⁶⁰ <http://news.met.police.uk/news/met-response-to-hmic-report-about-child-protection-201323>.

¹⁶¹ *Supra* n 10.

¹⁶² *Ibid* at paras 115-116,

¹⁶³ *Supra* n 22 and see text accompanying nn 125-127.

¹⁶⁴ *Supra* n 10 especially para 157.

by the police do not give rise to a duty? They also home directly onto the nature of the relationship between the police and the individual litigant. That relationship becomes the focal point of legal argument.

Drawing again on the idea of professional policing, we contend that relationships in all their complex and multifaceted instantiations are at the heart of policing; nor can these be easily reduced to, or classified in terms of, assumption or non-assumption of responsibility. This point is recognised by Lord Kerr in *Michael* who views the concept of proximity, for all its limitations,¹⁶⁵ as better able to accommodate the factual specificity of relational configurations.¹⁶⁶ It is Lord Kerr too who highlights the role of the police as professionals upon whom individuals are entitled to rely in circumstances of serious and imminent threat.¹⁶⁷

There are other aspects of the police role which set them apart from ordinary citizens and indeed from other types of public protective services. The sheer breadth of the enterprise of policing and the special coercive powers that the police are given place them in a unique position when it comes to interactions with the public. If, as has been argued, professional policing expertise lies primarily in the maintenance of good public relations at individual, local and national levels, the complex nature of this ongoing and multileveled relational endeavour generates the opportunity of productive synergies between any potential private duty owed to individuals and the general duty owed to the public at large. Taking *White v Jones*¹⁶⁸ as an example of the productive alignment of individual and collective concerns in relation to the determination of liability rules, there is a strong argument for applying a similar approach in a policing context. In this context Lord Toulson suggests that there is nothing in police *powers* that sets them apart from any other member of the public.¹⁶⁹ However, in *White v Jones* it was not solicitors' 'powers' that were significant in driving the motivation to find a way to overcome the legal constraints to the imposition of a duty of care. It was not that they were empowered or licensed by their membership of the law society to undertake the drafting of wills. It was the public importance of that professional function. The consequences at a macro level of that function being negligently performed with impunity resulted in the imposition of the private law duty as a matter of necessity.

¹⁶⁵ *Supra* n 10 at paras 145-147.

¹⁶⁶ *Ibid* at para 167: 'The notion that [proximity] can only arise where there has been an express assumption of responsibility by unambiguous undertakings on the part of the police and explicit reliance on those by the claimant ... fails to reflect the practical realities of life.'

¹⁶⁷ *Ibid* at paras 179-180.

¹⁶⁸ *Supra* n 90.

¹⁶⁹ *Supra* n 10 at para 115.

The formulation adopted by Lord Brown Wilkinson in *White v Jones* that the public importance of the professional role justified a duty of care for omissions in circumstances where there was ‘a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance’¹⁷⁰ is of particular value here. We are alive to the tremendous individual and organisational challenges that policing entails and are not arguing for a broad and unmanageable duty of care. What we are suggesting is that the increased professionalism within the police and the courts’ changing approach to professional liability make it difficult to sustain the argument that the police should not owe a duty of care in negligence at least in some circumstances. Moreover, where the police are enjoying the enhanced authority and associated instrumental benefits of professional status, there is a role for the courts in providing some check on the provision of those professional services as it does in relation to other professional groups.

7 Conclusion

In this article we have used the lens of professionalism to interrogate the arguments advanced in the courts against recognising a private law duty of care on the police in relation to their core investigative and crime-suppressing functions. It is our contention that police claims for professional status enhance rather than weaken the case for recognising a duty of care although we agree that such a duty should be carefully circumscribed along the lines outlined by Lord Kerr in *Michael*, who calls for a return to ‘the true rationale of the *Hill* case... that liability should not attach to the police *unless* there is a relationship of proximity...’.¹⁷¹ It is our view that on balance, police claims to professionalism tilt the legal and policy arguments in favour of imposing a duty of care on the police in relation to their investigative and crime-suppressing functions at least in some instances. Further, since claims to professionalism are claims to greater legitimacy based on a level of expertise, it is not only right that the police should be subject to some duty of care; but such claims to enhanced status will actually be diminished by an ongoing refusal to accept a modicum of judicial oversight in relation to professional standards.

¹⁷⁰ *Supra* n 90 at 274.

¹⁷¹ *Supra* n 10 at para 157.